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No. 694

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

A. T. DESMEDT, PRESIDENT, AMERICAN EXPORT ISBRANDTSEN LINES, INC., AMERICAN EXPORT LINES, ET AL., *Petitioners,*

v.

FEDERAL MARITIME COMMISSION AND LUDLOW CORPORATION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT LUDLOW CORPORATION IN OPPOSITION

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STATUTES INVOLVED

Section 27 of the Shipping Act, 1916, 46 U.S.C. § 826, is the statute principally involved. It reads:

> "For the purpose of investigating alleged violations of this chapter, the Federal Maritime [Commission] may by subpoena compel the attendance of witnesses and the production of books,

papers, documents, and other evidence from any place in the United States at any designated place of hearing."

The text of all other statutes involved is printed in Appendix C of the Petition.

QUESTIONS PRESENTED

1. Whether the Federal Maritime Commission, in a proceeding instituted on the basis of a formal complaint alleging certain rates to be unreasonably high in violation of the Shipping Act, 1916, has the authority to issue subpoenas pursuant to Section 27 of the Act requiring the production of documents relevant and material to a determination of the reasonableness of the challenged rates.

2. Whether subpoenas issued by the Federal Maritime Commission pursuant to Section 27 of the Shipping Act, 1916, and served upon persons located in the United States, may require the production of documents within such persons' possession or control which are located outside of the United States.

STATEMENT

On July 6, 1965, the Calcutta, East Coast of India and East Pakistan/U.S.A. Conference (the Calcutta Conference)[1] filed with the Federal Maritime Commission notice of a general across-the-board rate in-

[1] The Calcutta Conference is a formal association of steamship lines, domestic and foreign, having common tariffs, rates, practices and rules established pursuant to Agreement No. 8650, approved by the Federal Maritime Commission under Section 15 of the Shipping Act, 1916. The Commission's approval of the Calcutta Conference Agreement has the effect of exempting the rate-fixing activities of the Calcutta Conference from domestic antitrust laws. (R. 4a).

crease to become effective as of October 11, 1965. (R. 5a, 26a-27a). The respondent, Ludlow Corporation, a shipper of jute and jute products from Indian ports served by the Calcutta Conference, and legally obligated by virtue of a dual-rate contract to ship all of its imports with member carriers of the Calcutta Conference, immediately protested this rate increase to the Conference members. (R. 5a). It was joined by at least ten other shippers of jute and jute products and by the Government of India. (R. 27a). This protest, however, evoked no response.

On August 10, 1965, Ludlow Corporation filed a formal complaint with the Commission (R. 25a) alleging that rates filed by the Calcutta Conference on certain jute products were in violation of (1) Section 18 (b)(5) of the Shipping Act, 1916, 46 U.S.C. § 817(b)(5), as "so unreasonably high . . . as to be detrimental to the commerce of the United States"; (2) Section 15 of the Shipping Act, 1916, 46 U.S.C. § 814, in that the Calcutta Conference's rate-fixing agreement was being so used as to "operate to the detriment of the commerce of the United States" and "to be contrary to the public interest"; and (3) Section 14b of the Shipping Act, 1916, 46 U.S.C. § 813a, in that the Calcutta Conference's dual-rate agreement was being so used as to be "detrimental to the commerce of the United States" and "contrary to the public interest." (R. 28a, 29a). The complaint alleged, further, that the proposed rate increase had the "immediate and direct effect of severely impairing the competitiveness of the named jute products and of reducing Complainant's importation of these products." (R. 27a).

The Calcutta Conference answered the Ludlow complaint with the assertion that its proposed rates were

"fair and reasonable" and that the increase was "necessitated by increases in the cost of the carriage of such goods and in the cost of other essential services, including port charges and stevedoring." (R. 33a-34a).

At the prehearing conference held on September 15, 1965, before the Hearing Examiner assigned to the Commission proceeding, Ludlow attempted to secure from the member carriers of the Calcutta Conference *on a voluntary basis* information directly relevant to the reasonableness of the rate increase. This request, however, was refused. (Pet. App. A. 3).

On September 28, 1965, Ludlow applied to the Commission for issuance of subpoenas pursuant to Section 27 of the Shipping Act, 1916, in order to compel production of this information. (R. 36a). This application was granted by the Hearing Examiner on October 18, 1965. (R. 47a). Each of the subpoenas issued was identical in scope and required production of books and records, establishing the costs and earnings of the member lines of the Calcutta Conference in the relevant trade, or relating to the Calcutta Conference policy with respect to determining rate levels. (R. 49a-51a).

On October 19, 1965, the Hearing Examiner clarified his initial ruling to state that it was not to be construed "to require production of documents from any place not in the United States," because Commission policy required that the Commission itself pass on all requests for documents located abroad. (Pet. App. A. 5). Ludlow then applied to the Commission for issuance of subpoenas covering documents not located in the United States, and the application was granted on November 12, 1965. (R. 64a). Each of the petitioners, who are officials of the member lines of the

Calcutta Conference, was properly served with the Commission-issued subpoenas in New York City. (R. 6a).

A hearing on Ludlow's complaint was scheduled for December 7, 1965, to give the petitioners time to collect the subpoenaed materials. (Pet. App. A. 5). On December 2, 1965, the petitioners informed the Hearing Examiner that they would not comply with the subpoenas. (R. 68a). When the hearing was held on December 7, 1965, and the petitioners failed to appear and produce the materials subpoenaed, the hearing was recessed indefinitely and the Examiner certified to the Commission the fact of petitioners' noncompliance. (Pet. App. A. 5).

Both Ludlow and the Commission then applied to the United States District Court for the Southern District of New York for enforcement of the subpoenas. (Pet. App. A. 5). Petitioners in answer contended that the subpoena power was not available at all in the proceeding instituted by Ludlow's complaint and that, in any event, Maritime Commission subpoenas do not reach documents that are located abroad. The District Court, having first consolidated the two enforcement proceedings, directed full compliance with the subpoenas (R. 4a), finding that the Commission "clearly" had power "to compel [the petitioners] to produce evidence, wherever located, relevant and necessary to a determination of the charges made against them of violation of a statute under which they enjoy certain immunities . . . ." (R. 13a).

Petitioners appealed. The Court of Appeals affirmed the enforcement order of the District Court. (Pet. App. A. 1).

The Court of Appeals rejected petitioners' first contention—that the Commission has no Section 27 subpoena power in proceedings involving Sections 14b, 15 and 18(b)(5) of the Act—by referring to its holding in *FMC* v. *E. G. Caragher,* ... F.2d .... (2d Cir. 1966) (Pet. App. A. 6), that such a contention is "inconsistent with both the ostensible purpose of the regulatory pattern established by the Shipping Act of 1916 and the legislative history of Section 27." (Pet. App. D. 10-11).

The Court of Appeals found petitioners' second contention—that the Commission is without power to issue a subpoena requiring the production of evidence from outside the United States—"surprising as a matter of common sense" (Pet. App. A. 7), and, after carefully reviewing the legislative history and historical background of Section 27, concluded that "Congress has said, plainly enough for all to understand, that the Federal Maritime Commission ... can require a resident by subpoena to produce documents under his control wherever they are located ...." (Pet. App. A. 13).

REASONS FOR DENYING THE WRIT

The Petition states no "special and important reasons" within Rule 19 of the Rules of this Court why a writ of certiorari should be granted. No conflict of decisions between the circuits, or conflict with a prior decision of this Court, is alleged. The questions presented were correctly decided below. Petitioners' argument here is principally that the court below decided the questions incorrectly. Even if there were any substance to this contention, no ground for issuance of the writ would have been asserted. It is well established that the Court's certiorari jurisdiction is not to be exercised merely for the correction of errors

in lower court decisions.[2] But in fact the petitioners' allegations of error are without merit.

1. Petitioners' contention that the Commission has no subpoena power under Section 27 of the Shipping Act, 1916, in this case is based entirely on the fact that Ludlow's complaint before the Maritime Commission alleges violations of the Act in the filing and maintenance of unreasonably high rates. Petitioners argue that, because the Act does not in terms characterize unreasonably high rates as unlawful (even though it requires the Commission to disapprove any rate that it finds to be so unreasonably high as to be detrimental to the commerce of the United States), unreasonably high rates cannot be said to be in violation of the Act. On this basis petitioners contend that subpoenas cannot be issued because Section 27 provides for subpoenas only for the purpose of investigating alleged violations of the Act. (Pet. 12, 13).

The District Court found that this strained argument "is in no way supported by the wording of the Act and in principle offends the entire scheme of regulation embodied in the statute." (R. 7a). The Court of Appeals, referring to its decision in *FMC* v. *E. G. Caragher,* ... F.2d ... (2d Cir. 1966), agreed. (Pet. App. D. 10, 11). And Judge Friendly, in a concurring opinion filed in *Caragher,* went so far as to state that petitioners' argument "finds no basis in language, in history or in good sense." (Pet. App. D. 19).

In fact, acceptance of the logical consequences of petitioners' argument would make nonsense of important aspects of the 1916 Act. Section 22 of the Act, 46 U.S.C. § 821, is its only provision authorizing Com-

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[2] See, *e.g.*, Magnum Co. v. Coty, 262 U.S. 159, 163 (1923); Address of Chief Justice Vinson to the American Bar Association, 69 Sup. Ct. v, vi (1949).

mission adjudicatory action—either pursuant to private formal complaint or on the Commission's own motion. It permits such action only with respect to "violations." (Pet. App. D. 11, 12). If Ludlow's complaint does not allege a violation, as petitioners argue, the complaint must be dismissed, because no effective action can be taken on it. (R. 7a). The same logic would preclude a Commission investigation instituted on its own motion to determine whether the challenged rates are unreasonably high. (Pet. App. D. 11). Adoption of the petitioners' contention, therefore, not only would preclude the Commission from compelling the attendance of witnesses and the production of documents at the hearings required by the Act, but also would deprive the Commission of authority to institute an investigation in order to fulfill its statutory responsibilities. (Pet. App. D. 11). Such a result, viewed in light of the exemption accorded steamship conferences from domestic antitrust laws, is unthinkable.

The legislative history of the Shipping Act[3] indicates that Congress, in defining the Commission's Section 27 subpoena power, borrowed the phrase "for the pur-

[3] Petitioners' discussion of the legislative history of Section 18(b)(5) (Pet. 13, 14) is inaccurate. Senator Kefauver made it clear that Section 18(b)(5) codified "existing administrative interpretation of the Shipping Act of long standing, wherein the Commission's predecessors have declared unreasonably low or high rates to be detrimental to the commerce of the United States *in violation of section 15 of the Act.*" (Emphasis added.) 107 Cong. Rec. 19430 (1961). See also 107 Cong. Rec. 19429. In the Senator's statement quoted by petitioners (Pet. 14), Senator Kefauver was making the point that Section 18(b)(5) does not provide as strict a substantive standard as Section 201(b) of Title 47 (which declares simply that unjust or unreasonable charges are unlawful) because Section 18(b)(5) renders unlawful only those unreasonable rates that are "so unreasonable as to be detrimental to the commerce of the United States." 107 Cong. Rec. 19429.

pose of investigating alleged violations of this [Act]" from this Court's decision in *Harriman* v. *ICC*, 211 U.S. 407 (1908). (Pet. App. D. 13, 14). In borrowing the phrase, Congress simply adopted for the Maritime Commission the limitation imposed in *Harriman* on the Interstate Commerce Commission that subpoenas be issued only in adjudicatory proceedings. Thus, when Congress, having used the word "violations" in Section 22 to define the scope of the Commission's adjudicatory functions, used the same word in Section 27, it was using it as a word of art to insure that the Commission would have the power of subpoena in all adjudicatory proceedings initiated pursuant to Section 22. (Pet. App. D. 12, 13). There was clearly no intent to distinguish between, on the one hand, adjudicatory proceedings instituted to determine whether provisions that in terms declare certain practices to be unlawful have been violated, and, on the other, adjudicatory proceedings instituted to determine whether the Commission should disapprove and forbid the continuation of certain practices in light of broad normative criteria. (Pet. App. D. 15).

2. Petitioners' second contention—that the Commission's Section 27 subpoena power extends only to documents located in the United States—rests completely on what petitioners believe to be the "plain meaning" of the phrase in Section 27, "from any place in the United States." (Pet. App. A. 8, 9). The thrust of petitioners' argument is that, although the Commission is directed by Congress strictly to control and supervise the activities of rate-making conferences exempt from the domestic antitrust laws,[4] it is power-

[4] This Court has made it clear in FMB v. Isbrandtsen Co., 356 U.S. 481, 487-490 (1958), and in Carnation Co. v. Pacific Conf., 383 U.S. 213, 219 (1966), that the antitrust exemption was conditioned on effective Commission regulation.

less to require that residents of this country and resident officials of companies doing business here produce relevant documents that are located outside of the United States. (Pet. App. A. 8). The District Court accurately gauged the implications of petitioners' contention in its statement:

> "There then would be nothing to prevent them [rate-making conferences] from removing or maintaining all their documents abroad, and considering the nature of the business they are engaged in it is not unlikely that that is just where their documents might be found. That the administration of the Shipping Act cannot turn upon the incidental or accidental, or even intentional location of documents, is obvious." (R. 13a).

There is, as Judge Friendly noted in the opinion below, no evidence to support an interpretation which would "attribute to Congress a deep-seated intention to reach [an] irrational result." (Pet. App. A. 8). The phrase "from any place in the United States" used in Section 27 is common in a number of agency subpoena statutes. The courts of appeals that have dealt with the phrase have all held that the purpose and effect of the language are not to restrict the subpoena power to documents located in this country. In *SEC* v. *Minas De Artemisa, S.A.*, 150 F.2d 215, 218 (9th Cir. 1945), the Ninth Circuit construed the same language appearing in a subpoena provision of the Securities Act as empowering the SEC to require the production of documents located outside of the United States, provided that the subpoena is served within the United States. In *Mines & Metals Corp.* v. *SEC*, 200 F.2d 317, 320 (9th Cir. 1952), *cert. denied*, 345 U.S. 941 (1953), the court followed the *Minas* holding, stating that the contention made here by petitioner was

"frivolous." The petition for writ of certiorari raising the same issue as that raised here by petitioners was denied. No. 645, O.T. 1952. In the only prior consideration of Section 27 itself, the Court of Appeals for the District of Columbia Circuit in *Montship Lines, Ltd.* v. *FMB,* 295 F.2d 147, 153 (D.C. Cir. 1961), cited *Minas* in stating that the proposition now advanced by petitioners as to the restricted scope of Section 27 was dubious, though the question did not have to be decided there. In this case, where the question did have to be decided, Judge Friendly, after a thorough exploration of the legislative background of the language of Section 27, concluded that "the history makes it as 'plain' as anything can be" that Congress' purpose in using this language was to "enhance or confirm" the powers of the Commission and "not to thwart it by allowing parties to Commission proceedings to refuse to produce documents from foreign countries." (Pet. App. A. 12).

Judge Learned Hand in *Kerr S.S. Co.* v. *United States,* 284 F.2d 61, 64 (2d Cir. 1960), *appeal dismissed,* 369 U.S. 422 (1962), pointed out that in investigating the practices of carriers engaged in commerce with the United States it was essential that the Commission know what took place outside of the United States as well as inside; that if the Commission's power to examine witnesses as to transactions had abroad could not be questioned, neither could its power to compel the production of documents reflecting such transactions. And in *Montship, supra,* Judge Bazelon emphasized that Congress, in enacting the Shipping Act, recognized that foreign flag as well as United States carriers were subject to regulation; that limiting the Commission's investigatory powers to the territorial confines of the United States would substan-

tially impair the regulation of foreign flag carriers. 295 F.2d at 154. See also *Far East Conf.* v. *FMC*, 337 F.2d 146, 150 (D.C. Cir. 1964), *cert. denied sub nom. Pacific Coast European Conf.* v. *FMC*, 379 U.S. 991 (1965).

Petitioners' contention is but a play on words. It has been rejected each time it was raised in the past, and it was properly rejected by the court below.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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